

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
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Ways to Further Section 257 Mandate and to)	MB Docket No. 04-228
Build on Earlier Studies)	
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**REPLY COMMENTS OF
THE OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, INC.**

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SUMMARY

The Office of Communication of United Church of Christ, Inc. (UCC) submits reply comments in support of comments filed by Minority Media and Telecommunications Council (MMTC). UCC agrees with MMTC that after the holding in *Grutter v. Bollinger* that diversity is a compelling government interest, the FCC can now develop policies to promote female and minority broadcast ownership. Because broadcasting is a major source of education for the American public, racial and gender diversity in broadcast station ownership is just as important as diversity in the classroom. Thus, UCC asks the FCC to find that promoting racial and gender diversity in broadcast station ownership is a compelling government interest and to issue a NPRM to develop narrowly tailored policies to increase racial and gender diversity in broadcast ownership.

Grutter builds on a line of opinions that started with *Metro Broadcasting v. FCC*. There, the Supreme Court held that the advancement of diversity in broadcast ownership was, at minimum, an important government interest. Subsequently in *Adarand v. Peña*, however, the Court determined that strict scrutiny should apply to the government's use of racial classifications. To determine whether a government interest is compelling, the Court in *Grutter* has now clarified that remedying past discrimination is not the only permissible justification for race-based government action. The *Grutter* opinion found that a law school had a compelling interest in attaining a diverse student body for the purposes of creating an informed electorate, educating future leaders, breaking down racial stereotypes, and preparing students to function in the global marketplace.

Thus, *Grutter* opens the door for the FCC to determine that attaining racial and gender diversity in broadcast station ownership is a compelling interest because broadcast media, like a

law school, serves an important educational purpose. Both adults and children spend many hours watching television and listening to the radio. Increasing the racial and gender diversity of broadcast station owners would increase the diversity of programming available to the public because, as the Content/Ownership study and other studies have found, there are differences in the programming offered by minority and non-minority owned stations.

One purpose of diversity in education identified by the *Grutter* court is creating well-informed citizens. The broadcast media also play a pivotal role in educating citizens. Providing for a better informed electorate not only fosters civic participation but helps to train the next generation of leaders. Broadcast media can also contribute to educating future leaders by exposing young viewers and listeners to diverse ideas.

Grutter also identifies diversity as a means to breakdown stereotypes when a critical mass of minority students is achieved. In the same way, a critical mass of minority broadcasters would rebut any belief that there is a single minority viewpoint. Increasing racial and gender diversity in broadcast ownership can also help to break down stereotypes and promote cross-racial understanding. Increasing the racial and gender diversity of broadcast stations will give viewers more realistic views of persons of different races and backgrounds.

Finally, the *Grutter* opinion also cited many American businesses that argued that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints. Broadcasting can provide these benefits to a much wider audience than a university classroom could.

Because of the benefits that diverse broadcast media ownership will offer to the American public, the Commission should find that diverse broadcast ownership is a compelling

government interest and it should issue a NPRM to create programs that increase minority and female broadcast ownership.

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The Office of Communication of the United Church of Christ, Inc. (UCC) hereby submits reply comments in response to *Media Bureau Seeks Comment on Ways to Further Section 257 Mandate and to Build on Earlier Studies*, Public Notice DA 04-1690 (June 15, 2004), (“Public Notice”). The Public Notice asks for comment on possible next steps to further the Commission’s statutory mandate to further opportunities for minorities and women in communications in light of the recent Supreme Court decisions in *Grutter v. Bollinger*, as well on the import of the studies conducted pursuant to Section 257.

In these reply comments, UCC supports and expands on the comments filed by the Minority Media and Telecommunications Council (MMTC).¹ Specifically, UCC argues that the recent Supreme Court cases have answered in the affirmative the important question of whether diversity can be considered a compelling government interest that could justify using race as a factor in government decision-making. Because broadcasting is a major source of education for the American public, racial and gender diversity in broadcast station ownership is just as important as diversity in the classroom. Thus, we argue that the FCC should find that promoting

¹ MMTC Comments at 7. MMTC argues that that enhancing viewpoint diversity, remedying the effects of discrimination, supporting universal service, and promoting competition each create a compelling interest in increasing minority ownership.

racial and gender diversity in broadcast station ownership is a compelling government interest and ask that the Commission issue a NPRM to develop narrowly tailored policies to enhance racial and gender diversity in station ownership.

I. BACKGROUND

The FCC first adopted policies to promote minority ownership of broadcast stations in the late 1960s. This objective has been repeatedly reaffirmed by Congress² and the courts. Indeed, the Supreme Court found two FCC policies aimed at increasing minority and female broadcast ownership were substantially related to achievement of the legitimate governmental interest in broadcasting diversity and were thus constitutional under an intermediate scrutiny analysis in *Metro Broadcasting v. FCC*.³ Subsequently, however, the Court determined in *Adarand v. Peña*⁴ that strict scrutiny should apply to the federal government's use of racial classifications instead of intermediate scrutiny. Therefore, race-based action is constitutional only where it is narrowly tailored to further a compelling governmental interest.

To determine whether a government interest is compelling, the Court in *Grutter* has now clarified that remedying past discrimination is not the only permissible justification for race-based government action.⁵ In *Grutter*, the Court held that a Law School had a compelling

² Congress was concerned with promotion of diversity in broadcast media, and thus mandated that the FCC must "ensure that . . . businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. § 309(j)(4)(D); see also *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, 15 FCC Rcd 2329 ¶ 48-55 (*EEO Order*) (summarizing Congressional efforts to promote racial and gender diversity in communications); National Telecommunications and Information Administration, United States Department of Commerce, *Changes, Challenges and Charting New Courses: Minority Commercial Broadcast Ownership in the United States*, December 2002, at <http://www.ntia.doc.gov/opadhome/mtdpweb/01minrept/front00.htm>.

³ 497 U.S. 547 (1990).

⁴ 515 U.S. 200 (1995).

⁵ *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

interest in attaining a diverse student body.⁶ This decision opens the door for the FCC to determine that attaining racial and gender diversity in broadcast station ownership is also a compelling interest.

A. *Metro Broadcasting* Established that Racial Diversity in Broadcast Station Ownership is, at Minimum, a Substantial Governmental Interest

In *Metro Broadcasting*, the Supreme Court considered whether two FCC policies designed to promote minority ownership of broadcast stations – awarding enhancements for minority ownership in competitive hearings and the distress sale policy permitting the transfer of a limited category of stations to minority controlled firms – violated the equal protection clause.⁷ The Court concluded that “the interest in enhancing broadcast diversity is, *at the very least*, an important government objective.”⁸ The Court went on to explain:

Just as a diverse student body contributing to a robust exchange of ideas is a constitutionally permissible goal on which a race-conscious university admissions program may be predicated, *Regents of University of California v. Bakke*, the diversity of view and information on the airwaves serves important First Amendment values. The benefits of diversity are not limited to the members of minority groups who gain access to the broadcasting industry by virtue of the ownership policies; rather, the benefits redound to all members of the viewing and listening audience.⁹

The Supreme Court also found that “minority ownership policies are substantially related to the achievement of the Government’s interest.”¹⁰ Specifically, it noted that both the FCC and Congress had found a nexus between expanded minority broadcast ownership and programming

⁶ *Id.*

⁷ Even though these policies were upheld, they are no longer in use today.

⁸ *Metro Broadcasting*, 497 U.S. at 567-68 (emphasis added).

⁹ *Id.* at 568 (citations omitted).

¹⁰ *Id.* at 569.

diversity.¹¹ Moreover, the Court concluded that the “link between expanded minority ownership and broadcast diversity does not rest on impermissible stereotyping.”¹²

Rather, both Congress and the FCC maintain simply that expanded minority ownership of broadcast outlets will, in the aggregate, result in greater broadcast diversity. A broadcasting industry with representative minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogeneous group. The predictive judgment about the overall result of minority entry into broadcasting is not a rigid assumption about how minority owners will behave in every case but rather is akin to Justice Powell’s conclusion in *Bakke* that greater admission of minorities would contribute on average, “to the ‘robust exchange of ideas.’”¹³

Finally, the Court noted that “the conclusion that there is a nexus between minority ownership and broadcasting diversity – is corroborated by a host of empirical evidence.”¹⁴ It cited numerous studies and surveys documenting differences in on-air content between minority and majority owned broadcast stations.¹⁵

The Court went on to find that the FCC policies were appropriately tailored to serve this substantial governmental interest because race neutral efforts have failed to produce sufficient

¹¹ *Id.* at 569-71. As the Court explained:

The FCC’s reasoning with respect to the minority ownership policies is consistent with longstanding practice under the Communications Act. From its inception, public regulation of broadcasting has been premised on the assumption that diversification of ownership will broaden the range of programming available to the broadcast audience. Thus, “it is upon *ownership* that public policy places primary reliance with respect to diversification of content, and that historically has proved to be significantly influential with respect to editorial comment and the presentation of news.”

Id., at 570 (quoting *TV 9 v. FCC*, 495 F.2d 938 (D.C. Cir. 1975)) (emphasis in original).

¹² *Id.* at 579.

¹³ *Id.* (citing *Bakke*, 438 U.S. at 313).

¹⁴ *Id.* at 580.

¹⁵ *Id.* at n.31-34.

diversity in programming.¹⁶ It also found that the FCC policies were appropriately limited in extent and duration,¹⁷ and did not impose impermissible burdens on non-minorities.¹⁸

**B. *Adarand* Required Race-Based Programs to be Justified
By a Compelling Interest**

Because the opinion in *Metro Broadcasting* applied intermediate scrutiny, the Court did not find it necessary to address the question of whether broadcast ownership diversity rose to the level of a compelling government interest. The Court's decision to apply intermediate scrutiny was based on the fact that the FCC's minority ownership programs were benign race-conscious measures mandated by Congress.¹⁹ In *Adarand v. Peña*, the Court overruled that aspect of *Metro Broadcasting* and held that strict scrutiny applied to racial classifications of the federal government.²⁰

After the *Adarand* decision, many federal agencies including the FCC began to reexamine their affirmative action policies. The FCC commissioned a series of studies to "help determine whether it has a compelling interest under the strict scrutiny standards to support programs promoting license ownership by women and minorities."²¹ The *Staff Executive Summary* accompanying the release of these studies in December 2000 discussed applicable legal standards and found "two federal interests that could potentially provide the necessary

¹⁶ *Id.* at 585-86.

¹⁷ *Id.* at 594.

¹⁸ *Id.* at 586.

¹⁹ *Id.* at 563-64.

²⁰ 515 U.S. at 204, 227.

²¹ Federal Communications Commission, *Staff Executive Summary, Section 257 Studies*, at: http://www.fcc.gov/opportunity/meb_study/staff_executive_summary.pdf (*Staff Executive Summary*) at 2. These studies were released in December 2000, along with an Executive Summary by the FCC Staff. The studies were conducted pursuant to the Congressional mandate in Section 257 of the Telecommunications Act of 1996, to identify and eliminate market entry barriers for small businesses, and Section 309(j), to further opportunities for businesses owned by minorities and women.

factual predicate to meet the strict scrutiny test.”²² One is the “FCC’s interest in promoting the broadcast of a diversity of views.”²³ The other is the “FCC’s interest in remedying past discrimination.”²⁴ The *Staff Executive Summary* further explained that the *Adarand* decision “only overruled *Metro Broadcasting* to the extent that it applied intermediate rather than strict scrutiny, and in his dissent in *Adarand*, Justice Stevens provides a lengthy argument in support of the diversity rationale’s ability to survive under strict scrutiny. Accordingly, the possibility that this First Amendment interest [of promoting broadcast programming diversity] would be accepted as compelling has been left open.”²⁵

C. *Grutter* and Subsequent Cases Make Clear that Diversity is a Compelling Government Interest

The recent Supreme Court decision in *Grutter* has affirmatively answered the question of whether diversity can be a compelling government interest. In *Grutter*, the Supreme Court held that “student body diversity is a compelling state interest that can justify the use of race in university admissions.” The Court reasoned that the benefits of classroom diversity constitute a compelling government interest because “effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”²⁶ The opinion cites with approval Justice Powell’s reasoning in *Bakke* that a university has a prominent goal in selecting students who will contribute to a robust exchange of ideas.²⁷

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 3.

²⁵ *Id.* (citations omitted).

²⁶ *Grutter*, 539 U.S. at 328, 332.

²⁷ *Id.* at 327.

The plaintiff in *Grutter* was a white, female Michigan resident who applied to the University of Michigan Law School. Her grades and test scores were within the range of accepted scores but she was not admitted. She alleged that race was used as a “predominant factor” in admissions decisions and argued that there was no compelling interest for using race as a factor in its admissions decisions.²⁸ The Court rejected the plaintiff’s claims, holding that the University had an unquestionably compelling interest in a diverse student body and that the admissions programs used to further that compelling interest were narrowly tailored.²⁹

The Court further explained that remedying past discrimination is not the only permissible justification for race-based governmental action. “[W]e have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination.”³⁰

The Court then explained why diversity is in fact a compelling governmental interest. The Court found that the benefits of a diverse classroom are “substantial.”³¹ First, it emphasized the benefits of “cross-racial understanding,” “[breaking] down racial stereotypes,” “and [enabling] students to understand persons of different races.”³² Second, the Court cited to the amicus briefs of major multi-national corporations explaining that “the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints.”³³ Third, the Court explained that diversity in the law school classroom is essential to promoting good citizenship and educating a generation of

²⁸ *Id.* at 317.

²⁹ *See id.* at 343.

³⁰ *Id.* at 328.

³¹ *Id.* at 330.

³² *Id.*

³³ *Id.*; *see also*, *Brief for 3M et al.*, as *amicus curiae*, at 5.

leaders: “Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”³⁴

In the short time since *Grutter*, several other decisions have extended the rationale that diversity is a compelling government interest to other contexts. In the companion case of *Gratz*,³⁵ the Supreme Court found that diversity in undergraduate university admissions is also a compelling interest. In *McFarland v. Jefferson County Public Schools*,³⁶ a federal district court held that the Jefferson County Public Schools’ (JCPS) race-sensitive admission program “meets the compelling interest requirement because it has articulated some of the same reasons for integrated public schools that the Supreme Court upheld in *Grutter*.” *McFarland* advanced the diversity rationale to elementary and middle school admissions policies.³⁷ In *Parents Involved in Community Schools v. Seattle School District No. 1*,³⁸ the Ninth Circuit rejected claims that *Grutter*’s holding “was expressly limited to the use of race in admissions in the context of ‘the expansive freedoms of speech and thought associated with the university environment.’”³⁹ The court went on to hold:

At bottom, *Grutter* plainly accepts that constitutionally compelling internal educational and external society benefits flow from the presence of racial and ethnic diversity in education institutions...Those benefits are as compelling in the high school context as they are in higher education.⁴⁰

Another case decided in the wake of *Grutter* extended the rationale that diversity is a compelling interest entirely outside the context of education. In *Petit v. City of Chicago*, the Seventh Circuit extended *Grutter*’s diversity rationale to promotions and hiring decisions within

³⁴ *Grutter*, 539 U.S. at 332.

³⁵ 539 U.S. 244.

³⁶ 330 F.Supp.2d 834 (E.D. K.Y. 2004).

³⁷ The school’s interest in diverse classrooms was upheld, but the programs used to achieve that diversity were struck down.

³⁸ 377 F.3d 949 (9th Cir. 2004).

³⁹ *Id.* (quoting *Grutter*, 539 U.S. at 330).

⁴⁰ *Parents Involved in Community Schools*, 377 F.3d at 958.

the Chicago Police Department (CPD).⁴¹ CPD had adjusted the manner of scoring a police exam used in promotion to the rank of sergeant.⁴² All minority candidates for promotion had failed the sergeant's exam and, as a result, no minorities would have been promoted to the rank of sergeant.⁴³ However, when the exam was rescored to account for scoring differences between minority and non-minority candidates, the group of officers promoted reflected the proportional makeup of the available candidate pool.⁴⁴ The Seventh Circuit explained that "there is an even more compelling need for diversity in a large metropolitan police force charged with protecting a racially and ethnically divided city like Chicago. Under the *Grutter* standards, we hold, the City of Chicago has set out a compelling operational need for a diverse police department."⁴⁵

Thus, not only can diversity be a compelling government interest but it is not limited to the law school classroom.

II. THE FCC SHOULD FIND THAT RACIAL AND GENDER DIVERSITY IN BROADCAST OWNERSHIP IS A COMPELLING GOVERNMENT INTEREST

The same types of benefits from racial diversity in an academic setting can come from racial and gender diversity in broadcast station ownership. In fact, these benefits may be even more substantial because they can be realized by the population as a whole, not just the students in a law school.

Broadcasting has always served an important educational function for both adults and children. Broadcast stations offer local, national and international news, discussions of public affairs, information about health, arts and culture, and various other programs that educate and

⁴¹ 352 F. 3d 1111, 1115 (7th Cir. 2003).

⁴² *Id.* at 1116.

⁴³ *Id.*

⁴⁴ *Id.* at 1117-8.

⁴⁵ *Id.* at 1115.

inform viewers on a daily basis. Even programs perceived as entertainment often contain intended or unintended messages about the world in which we live. These programs may include positive portrayals of minorities, like the *Cosby* show, or they may promote negative stereotypes, often displaying minorities as criminals. Some programs ignore minorities altogether, for example, several shows set in large cities present nearly all-white casts, which is in complete discord with reality in a large American urban center. As Professor Len Baynes notes, “Of course, television need not portray reality, but the absence of racial and ethnic groups from the media becomes a problem to the extent it suggests the excluded groups do not matter or do not exist. Correspondingly, when the presented images of people of color are stereotypical, the larger society relies upon these images to define the group.”⁴⁶

At present, the owners of broadcast outlets are overwhelmingly white males. As MMTC points out, even though one-quarter of the nation’s population is made up of racial or ethnic minorities, such individuals own only approximately 1.2 percent of the equity in the broadcast industry.⁴⁷ And while the number of minority-owned radio stations has increased recently, it still remains extremely low at about 4 percent of all stations and the number of minority radio licensees has actually decreased. Moreover, the number of minority-owned full power television stations has dropped from 33 to 24 in the years since the Commission deregulated local television station ownership.⁴⁸ The Association of Women in Radio and Television likewise reports that although women make up 51.7 percent of the population, only 3.55 percent of the 11,609 stations submitting ownership reports in 2003 are controlled by women.⁴⁹

⁴⁶ Leonard Baynes, *White Out: The Absence and Stereotyping of People of Color by the Broadcast Networks in Prime Time Entertainment*, 45 Ariz. L. Rev. 293, 312 (2003).

⁴⁷ MMTC Comments at 2.

⁴⁸ *Id.*

⁴⁹ AWRT Comments at 1.

Increasing the number of minority and female owners would add new perspectives and increase the diversity of programming available to the public. It will also promote the First Amendment goals of a robust exchange of ideas.⁵⁰

A. Broadcasting Serves an Important Educational Function

Broadcasting has a great influence on how Americans perceive the world. Access to the broadcast media is almost universal in this country. Aside from work and sleep, television viewing is the primary activity of most Americans.⁵¹ The average American spends over three hours per day listening to the radio or watching television.⁵² Many studies show that broadcasting is the primary source of news.⁵³ In addition, a recent study shows that many adult Americans get much of their information about health issues from local news broadcasts.⁵⁴ Broadcast stations are also a primary method by which the public has access to movies, music, and other cultural programming.

Broadcasting also has a significant influence on children. The FCC has found that the government has a “compelling, interest in educating America’s children,” and using broadcast

⁵⁰ *Grutter*, 539 U.S. 568.

⁵¹ G. Comstock et al., *Television and Human Behavior* at 10 (Columbia Univ. Press 1978).

⁵² Nielsen Media Research, *Consumer Media Usage Survey*, September, 2002, at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A17.pdf.

⁵³ See generally 2002 *Biennial Regulatory Review*, 18 FCC Rcd 4726 (2002); see also Nielsen Media Research, *Consumer Media Usage Survey*, September, 2002, at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A17.pdf. The Nielsen study found that nearly 90% of Americans polled got most of their daily news from broadcast TV and roughly 40% got their news from radio.

⁵⁴ Center for Media and Public Affairs, *Crime Most Common Story on Local News*, October 2003, at: <http://www.cmpa.com/studies/AssessingLocalNews.htm>. While the title of this article focuses on crime as the most common story on local news, the study also highlighted some positive features of local news—one of the major points being that many Americans receive vital health information from local news broadcasts. Local news highlights many diseases and their treatments, and environmental and lifestyle health issues that affect the local community. Local news showcases practical news, “such as how to choose an HMO or how to prevent heart disease.” *Id.*

media to achieve that interest has long been within the scope of the “long recognized obligation of broadcasters to serve the public interest.”⁵⁵ Children aged 2-17 watch, on average, approximately 25 hours of television per week or 3.5 hours of television per day. One in five children watches in excess of 35 hours per week.⁵⁶ Thus, children spend roughly as many hours learning from television as they spend in the classroom.

Not all learning from broadcasting is positive, however. Children Now, for example, has been concerned that the lack of racial and gender diversity of on-air talent has negative effects on children.⁵⁷ When children see certain groups or one gender portrayed as privileged while others are excluded, that communicates that these groups have different values in our society. Children Now’s examination of diversity on prime-time television found that white males continued to dominate the 2003-2004 season. Children Now found, for example, that while 32 percent of white characters were employed in high status professional occupations like physician, attorney, or elected official, only 11 percent of Latinos held similar occupations.⁵⁸ And while only 5 percent of white characters were portrayed as criminals, 46 percent of Middle Eastern characters played that role.⁵⁹

The study found that gender played a similar role in character portrayals. Male characters outnumbered female characters as attorneys (71 percent were male), physicians (80

⁵⁵ *Policies and Rules Concerning Children’s Television Programming Revision of Programming Policies for Television Broadcast Stations*, 11 FCC Rcd 10660, ¶ 7 (1996). Congress recognized the important role of television in education children when it passed the Children’s Television Act (CTA) of 1990 which requires stations to air some programming specifically designed to educate and inform children. 47 U.S.C. §§ 303(a), 303(b), 394 (1990).

⁵⁶ Douglas A. Gentile & David A. Walsh. *Normative Study of Family Media Habits*, *Applied Developmental Psychology*, 23, 157-178, 28 Jan. 2002; National Institute of Media and the Family, *Media Facts*, at: http://www.mediafamily.org/facts/facts_childandtv.shtml.

⁵⁷ Children Now, *Fall Colors Prime Time Diversity Report* May 2003, at <http://www.childrennow.org/media/fc-2003-highlights.cfm>.

⁵⁸ *Fall Colors* at 6.

⁵⁹ *Id.*

percent), law enforcement officers (82 percent), paramedics or firefighters (84 percent), and elected or appointed officials (92 percent).⁶⁰ Female characters were more often found playing domestic workers (67 percent were female), clerical workers/secretaries (76 percent), nurses (81 percent), and homemakers (100 percent).⁶¹ Thus, in today's broadcast offerings, young people see women and minorities in less valued and less respected occupations.

The problem here is not only that portrayals of minorities are statistically skewed, but that the individual characters, portrayals, and storylines are often very stereotypical. For example, Professor Leonard Baynes notes that starting with the Amos 'N Andy Show, the majority-controlled broadcast media has provided an extremely stereotypical portrait of minority group members.⁶² Throughout the twentieth century and into the twenty-first, networks have showcased such programs as *Sanford and Son* (1972), portraying African American men as “infantile, lazy, and always trying to ‘get over,’”⁶³ and *Gimme a Break!* (1985), placing acclaimed actress Nell Carter in the role of a modern-day “mammy.”⁶⁴ The trend has culminated in such contemporary programs as *Homeboys in Outer Space* (1998) where “a pair of twenty-third century ‘brothers’... [hang] out’ in the universe at large, hopping from one galaxy to another in their ‘Space Hoopty.’”⁶⁵

This problem of stereotypes has not been limited to entertainment programming. A study analyzing local news broadcasts in Los Angeles found that these newscasts disproportionately

⁶⁰ *Id.* at 8.

⁶¹ *Id.*

⁶² See Leonard Baynes, *White Out: The Absence and Stereotyping of People of Color by the Broadcast Networks in Prime Time Entertainment*, 45 Ariz. L. Rev. 293 (2003).

⁶³ *Id.* at p. 336.

⁶⁴ *Id.* at p. 338.

⁶⁵ *Id.* at p. 341.

showed minorities as violent criminals when airing local crime stories.⁶⁶ These newscasts led viewers to stereotype minority group members as perpetrators of violent crime in their communities.⁶⁷ The impact of the local news stories was so great that even where no photo of the alleged perpetrator of a crime was flashed on the news, and where no mention of the race of the alleged perpetrator was made, study participants still attributed the crime to a minority group member.⁶⁸

B. Increasing Racial and Gender Diversity of Broadcast Station Owners Would Increase the Diversity of Programming Available to the Public

Because television and radio cannot tell or show their audiences everything that is happening in the world, broadcast stations owners, directly or indirectly decide what programs to air, what information to broadcast, and what news stories to cover.⁶⁹ Therefore, diversifying broadcast ownership will result in greater program diversity.

As discussed above, the Supreme Court in *Metro Broadcasting* found ample evidence of the nexus between minority ownership and programming. Since that time, additional studies have reached the same conclusion.

⁶⁶ Franklin D. Gilliam and Shanto Iyengar, *Prime Suspects: The Corrosive Influence of Local Television*, American Journal of Political Science, Vol. 44, No. 3, pp. 560-573 (2000).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ One current example of owner influence in the newsroom is the way Sinclair Broadcasting's owner and CEO ordered the group's stations to air a program that was decidedly hostile to one presidential candidate shortly before the 2004 election. Viewers in markets where a Sinclair station is the only news provider would have effectively been deprived of obtaining a more well-rounded perspective of the presidential candidates. Sinclair Broadcasting has been criticized for "top-down" management, where "local" news is hand picked and prefabricated by Sinclair's CEO David Smith. Sinclair's former Washington bureau news chief, who was fired after he spoke out against the pre-election program, reports that Smith's influence in the news room is so great, Smith would show up in the news room and "toss out ideas that ended up in the evening broadcasts." (Paul Schmelzer, *The Eternal Twilight of the Sinclair Mind*, AlterNet October 20, 2004 at: <http://www.alternet.org/story/20240/>). This is just one example of how ownership and management influence the selection of news.

One of the studies commissioned by the FCC, the Content/Ownership Study,⁷⁰ surveyed minority and majority-owned radio and television stations to determine the difference in attitudes and actions of minority and majority station owners.⁷¹ It found that particularly for radio stations, “minority-owned stations pay special attention in public affairs broadcasting to events of greater concern to ethnic or racial minority audiences. They report putting greater effort toward live coverage of government meetings” and to “issues concerning women, particularly health issues.”⁷²

The Content/Ownership Study also found that among radio stations that make an effort to adapt wire news to better fit their own communities, 73 percent of minority-owned stations tailor a national or regional wire story to local minority community concerns, while only 36 percent of majority-owned stations tailored stories on this basis. The Content/Ownership Study also found a difference in the stories selected by minority and majority-owned stations. While approximately one-third of minority and majority-owned stations reported that there was a major news story in the past three months that their station had covered but their chief news competitor had not, minority-owned radio and television stations were significantly more likely to say that they decided to cover the story with a particular audience in mind.⁷³

⁷⁰ Christine Bachen, Allen Hammond, *et al.*, *Diversity of Programming in the Broadcast Spectrum: Is there a Link Between Owner Race or Ethnicity and News and Public Affairs Programming?* (December 1999) at http://www.fcc.gov/opportunity/meb_study/content_ownership_study.pdf.

⁷¹ *Id.* at 5. The Content/Ownership Study found that even though minority stations had an average of 3.28 people working in the news department and majority stations had an average of 10.57 people, *Id.* at 7, no differences emerged between minority and majority-owned stations in the amount of news they produce overall. *Id.* at 11.

⁷² *Id.* at 20. The Content/Ownership Study occasionally provides more specific information on radio than on television because there were too few minority owned television stations to always provide accurate statistics.

⁷³ *Id.* at 12. Many of these minority-owners were thinking of racial or ethnic minority audiences, while very few majority-owned stations made such a consideration when deciding which stories

Another significant difference appeared when television station owners were asked whether they broadcast political or current events shows other than news. A significantly greater proportion of minority television station owners, 80 percent, broadcast this type of programming while only 47 percent of majority-owned television stations broadcast this type of public affairs programming.⁷⁴

Significant differences between minority and majority owners also arose when asked whether the station does live broadcasts of community events. 73 percent of minority radio stations carried such live broadcasts compared with only 55 percent of majority-owned radio stations.⁷⁵ In addition, 92 percent of minority-owned radio stations participated in community events targeted at women and minorities compared to 70 percent of majority-owned radio stations.⁷⁶

to report. *Id.* at 12-13. A similar pattern developed when majority and minority-owned stations were asked whether they could remember reporting a story with an approach that differed from their competitors. *Id.* at 13. Minority-owned radio stations had a racial or ethnic minority audience in mind 78 percent of the time they used a different approach than their competitor while majority-owned stations had racial and ethnic minority audiences in mind 13 percent of the time. *Id.* Minority and majority-owned stations also displayed a significant difference when asked about their news directors' missions. The majority, 68 percent, of majority-owned radio stations sought to aim for wide audiences while the majority, 52 percent, of minority-owned radio stations tried to attract particular audiences. *Id.* (A similar comparison was not available with television station owners due to low numbers of minority owned television stations).

⁷⁴ *Id.* at 14-15. This disparity also extends to programming aimed at the elderly. While 60 percent of minority television owners broadcast programs about issues of concern to senior citizens, only 30 percent of majority-owned television stations followed suit. *Id.* Disparities also arose when asked about the coverage of Native Americans. 29 percent of minority-owned radio stations reported this type of coverage compared 13 percent of majority-owned radio stations. *Id.* at 16. Similar patterns arise when owners are questioned about programming of interest to Hispanic audiences. Minority-owned radio stations broadcast this type of programming at a rate of 54 percent while majority-owned stations lag behind at 25 percent. *Id.* at 17.

⁷⁵ *Id.* at 15.

⁷⁶ *Id.* at 20. This difference between minority and majority-owned stations also has a significant effect on broadcasts about culture, music or the arts. *Id.* at 15. 72 percent of minority-owned and 35 percent of majority-owned radio stations said they broadcast programs about culture, music, or the arts in order to appeal to certain racial or ethnic minority groups. *Id.* Television

Minority ownership also results in significant difference in the number of on-air personalities who are minorities. An average of 89 percent of on-air talent in a minority-owned radio station is from a minority group compared to just 33 percent for majority-owned radio stations.⁷⁷ The ratio was only slightly better at television stations, with 47 percent on-air minorities at minority-owned stations and 30 percent at majority-owned stations.⁷⁸

A 2001 study by Peter Siegelman and Joel Waldfogel found that increasing minority ownership in a given market “increases the amount of minority-targeted programming.” This study examined “preference externalities” and showed how Black and White/Hispanic radio programming preferences are “substantially different.”⁷⁹ Because radio stations, even some of those targeting minority audiences, are primarily white-owned, white preferences in programming result in the under-provision of broadcasting for minorities. The study found evidence that promoting minority ownership worked to combat the problem of preference externalities and thus the under-provision of minority-targeted broadcast media.

In conducting its *2002 Biennial Review* of broadcast ownership rules, the Commission specifically “sought comment on whether the longstanding presumed link between ownership and viewpoint could be established empirically.”⁸⁰ After reviewing all of the comments, the Commission reaffirmed its conclusion that diversifying ownership was the best way to promote

station owners showed less of a difference with 64 percent of minority-owned and 45 percent of majority-owned stations airing arts-related programming with a racial or ethnic community as the intended audience. *Id.*

⁷⁷ *Id.* at 19.

⁷⁸ *Id.*

⁷⁹ Peter Siegelman & Joel Waldfogel, *Race and Radio: Preference Externalities and the Provision of Programming to Minorities* (2001), at http://www.fcc.gov/ownership/roundtable_docs/Waldfogel-c.pdf.

⁸⁰ *2002 Biennial Review* at ¶ 21.

viewpoint diversity.⁸¹ The Commission noted that that, in the context of news and public affairs programming, media owners clearly have the ability to affect public discourse.⁸² The Commission again reaffirmed that encouraging minority and female ownership was important Commission objective.⁸³

In sum, the Content/Ownership Study, the Siegelman-Waldfoegel study, and the FCC's own 2002 *Biennial Review* all provide further support for the Supreme Court's finding in *Metro Broadcasting* that increasing racial diversity of broadcast station owners will increase diversity of programming.

C. Greater Racial and Gender Diversity in Broadcast Ownership Would Foster a Better Informed Citizenry and Help Prepare Future Leaders

Grutter identifies one purpose of diversity in education as creating well-informed citizens.⁸⁴ Studies have shown that broadcast media play a pivotal role in educating the electorate on current affairs issues which in turn impact voting, thus serving the same important purpose university education does in creating good citizens. However, broadcast media is currently failing to fully educate Americans on important civic issues⁸⁵ For example, one study

⁸¹ *Id.* at ¶ 26-30.

⁸² *Id.* at ¶ 28.

⁸³ *Id.* at ¶ 46.

⁸⁴ *Grutter*, 539 U.S. at 334.

⁸⁵ Lear Center Local News Archive, *Presidential Race Sucks Up Most of the Media Oxygen; Coverage Is Mainly Strategy and Horserace*, Interim Report: 2004 at 3. See also Annenberg Study, *Most Americans Still Unfamiliar with Presidential Candidates* (1999), at http://www.annenbergpublicpolicycenter.org/naes/pdf/naes2000/2000_campaign2000_122000-2.pdf; see also Annenberg Study, *One Out of Two Still Not Ready to Vote*, August 25, 2000, at http://www.annenbergpublicpolicycenter.org/naes/pdf/naes2000/2000_report5.pdf. These studies showed that, despite news coverage, Americans weren't sure who the candidates were or what the issues were in the 2000 presidential election. Less than half of the sample of voters polled could identify all potential major party candidates for the presidency. These studies also focused on the amount of issue coverage Americans received during the 2000 presidential

showed that while most Americans get their campaign news from broadcast media, less than 30 percent of local news stories about the candidates and the campaign in the 2004 presidential election cycle have focused on issues and candidate positions.⁸⁶ Further, only 5 percent of local news broadcasts covered the candidates and issues relevant in local elections.⁸⁷ Another study found that “most stations largely ignored [the 2002 general election] during their top rated news programming ... [and when] the stations covered races, they usually did so late in the campaign and in a superficial manner.”⁸⁸

Promoting greater racial diversity in broadcast ownership station ownership could help ensure that information about candidates and issues are more accessible to a wider range of voters. As discussed above, the Content/Ownership Study found that minority-owned broadcast stations tailor their programming to their surrounding communities and also tend to cover issues their majority-owned competitors fail to acknowledge.⁸⁹

Providing for a better informed electorate not only fosters civic participation but helps to train the next generation of leaders. Quoting Justice Powell in *Regents of the University of California v Bakke*, the *Grutter* Court explained that students steeped in diverse ideas would be prepared to lead American society because “nothing less than the ‘nation’s future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this

election cycle, highlighting that many Americans use the information they receive from broadcast media to inform their voting choices.

⁸⁶ Pew Center for Civic Journalism, *Straight Talk From Americans—2000: Detailed Findings: News Media, Media Usage*, at http://www.pewcenter.org/doingcj/research/r_ST2000nat2.html#media.

⁸⁷ *Id.*

⁸⁸ The Lear Center Local News Archive, *Local News Coverage of the 2002 General Election, Executive Summary* at 4.

⁸⁹ See *supra* section II.B.

Nation of many peoples.’”⁹⁰ Broadcast media can also contribute to educating future leaders by exposing viewers and listeners to diverse ideas.

D. Increasing Racial and Gender Diversity in Broadcast Ownership Would Help Break Down Stereotypes and Promote Cross-Racial Understanding

Increasing racial and gender diversity in broadcast ownership can also help to break down stereotypes and promote cross-racial understanding. As Professor Gilliam found, the “persistence of racial segregation means that impersonal influences such as media are likely to play a significant role in development of racial attitudes.”⁹¹ Increasing the racial and gender diversity of broadcast stations will give viewers more realistic views of persons of different races and backgrounds.

Justice O’Connor’s decision in *Grutter* explains that a “critical mass” of minority students is necessary to help rebut “any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.”⁹² In the same way, a critical mass of minority broadcasters would rebut any belief that there is a single minority viewpoint.⁹³ Not only would multiple minority owners be likely to express different views, but

⁹⁰ *Id.* (quoting *Bakke* at 318).

⁹¹ Franklin Gilliam, UCLA Center for Communications and Community, *Where You Live and What You Watch: The Impact of Racial Proximity and Local Television News on Attitudes about Race and Crime*: 2002, at <http://www.uclaccc.ucla.edu/studies.php>.

⁹² *Grutter*, 539 U.S. at 333.

⁹³ In her dissent in *Metro Broadcasting*, Justice O’Connor asserted that the interest in increasing the diversity of broadcast viewpoints was not compelling for two reasons. 487 U.S. at 612 (O’Connor, J. dissenting). The first reason – that the modern equal protection doctrine saw remedying the effects of racial discrimination as the only compelling government interest – no longer holds since *Grutter* found that diversity in the classroom is also a compelling interest. The second reason cited by O’Connor was that “the interest in diversity of viewpoint provides no legitimate, much less important, reason to employ race classifications apart from generalizations impermissibly equating race with thoughts and behavior.” *Id.* at 615. However, research done subsequent to *Metro Broadcasting*, has provided an empirical basis for concluding that minority

the Content/Ownership Study found that minority owned stations tended to employ significantly more on-air minority talent. Minority owners are also less likely to select programming that portrays racial minorities in a stereotypical manner.

There is evidence that increasing minority presence in making broadcasting decisions has the effect of reducing the unconscious racism that many may not even be aware they are perpetuating.⁹⁴ For example, a study by the U.S. Commission on Civil Rights found increased minority ownership of broadcast media and minority news staffs in radio, television and newspapers helped to reduce the previously high levels of overt stereotyping of minority group members on local media in the Minnesota Twin Cities area.⁹⁵ In addition, increased minority participation can lead to better coverage of important issues. For example, one former news director testified, “I can tell you from being at the Pioneer Press, having a talented, young, Arab American woman in our newsroom meant that the paper did a far better job of covering the impact of 9/11 and the reaction in the local Muslim community than we would have done otherwise.”⁹⁶ In another study, researchers found that many believe that “a minority executive can make a difference in several key areas, including a news operation’s sensitivity to racism and

owned stations provide different program content that is not based on equating race with thoughts and behavior. *See supra* at section II.B.

⁹⁴ See Niljana Dasgupta & Anthony Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice With Images of Admired and Disliked Individuals*, *Journal of Personality and Social Psychology*, Vol 81, No. 5 (2002). Dasgupta found that many individuals express unconscious stereotype biases (i.e. associating a piñata or mariachi band with Hispanic culture and not thinking about a more nuanced picture of Hispanics as individuals) can be combated by showing positive images of minorities. As Dasgupta has noted in another context, “If we can change these nonconscious prejudices for a short period by changing the type of images people see in their social environment, perhaps we can then attempt to produce more enduring changes in the future.” American Psychological Assn., *Prejudices Toward Minority and Age Groups Can Be Lessened by Social Context*, Press Release, at <http://www.apa.org/releases/autoattitudes.html>.

⁹⁵ United States Commission on Civil Rights, *Study on Minnesota Minority Communications Report*, at <http://www.usccr.gov/pubs/sac/mn1203/summ.htm>.

⁹⁶ *Id.*

how it covers minority groups.”⁹⁷ Thus, there is ample evidence to show that increased minority ownership will help to promote cross-racial understanding.

E. Greater Diversity in Broadcast Ownership Would Help Americans Compete in the Global Marketplace

The Supreme Court in *Grutter* explained that, “[the] benefits [of diversity] are not theoretical but real, as major American businesses have made clear that the skills needed in today’s increasingly global marketplace can *only be developed* through exposure to widely diverse people, cultures, ideas and viewpoints.”⁹⁸ Broadcasting can provide benefits similar to those experienced by the law students in *Grutter* by exposing the general public to “widely diverse people, cultures, ideas and viewpoints” on a much larger scale than a university classroom ever could.⁹⁹ Increasing the number of minority broadcast owners will surely expose the public to a more diverse range of people, cultures, ideas and viewpoints. In order to prepare

⁹⁷ Maggie Rivas-Rodriguez, *et al.*, *Minority Journalists’ Perceptions of the Impact of Minority Executives*, 15 Howard J. Comm. 39, 2004. Similar studies linking minority employment with diverse programming across media include: Dwight E. Brooks, George L. Daniels & C. Ann Hollifield, *Television in Living Color: Racial Diversity in the Local Commercial Television Industry*, 14 Howard J. Comm. 123 (2003) and Raymond Ankney & Deborah Procopio, *Corporate Culture, Minority Hiring and Newspaper Coverage of Affirmative Action*, 14 Howard J. Comm. 159 (2003).

⁹⁸ *Grutter*, 539 U.S. at 330 (emphasis added).

⁹⁹ To come to this conclusion, the Court in *Grutter* relied on the business expertise of many major American businesses, including a group of media companies, in concluding that exposure to diversity was essential to success in the global marketplace. The amicus brief of various broadcasting companies argued, “It is essential to amici that the University of Michigan and other leading universities be able to take race and ethnic background into consideration in their admissions decisions. Amici are in the business of communication. Their success and the future of this country depend on amici’s ability to communicate with people and communities reflecting increasingly diverse racial and ethnic backgrounds.” *Brief of Amici Curiae Media Companies*, 2003 WL 554414 (2003). Also, in its amicus brief in *Grutter*, General Motors explained that, to succeed in the twenty first century, “American businesses must select leaders who possess cross-cultural competence – the capacities to interact with and to understand the experiences of...persons of different races, ethnicities and cultural histories...[Cross-cultural] competence is the most important new attribute for future effective performance in a global marketplace.” *Grutter*, 539 U.S. at 330, quoting *Brief for General Motors Corp. as amicus curiae*, 2003 WL 399096 (2003) at 4.

all Americans for transactions in a global society, broadcast license ownership must reflect the diversity of the “global society” already residing within our nation.

CONCLUSION

Just as racial diversity in an academic setting serves compelling interests, so too does racial and gender diversity in broadcast ownership. The FCC should find that racial and gender diversity in broadcast ownership is a compelling governmental interest and promptly initiate a rulemaking proceeding to develop narrowly tailored policies to further racial and gender diversity in broadcast ownership.

Respectfully Submitted,

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